

Members

Sen. Beverly Gard, Chairperson
Sen. Kent Adams
Sen. Glenn Howard
Sen. Vi Simpson
Rep. Ron Herrell
Rep. Jonathan Weinzapfel
Rep. Richard Mangus
Rep. David Wolkins
Gary Reding
Randy Edgemon
Mayor William Goffinet
Mayor James Trobaugh
Art Smith, Jr.
Ellen Tobias
William Hayden
Kerry Manders
Lori F. Kaplan
Sandra Miles



ENVIRONMENTAL QUALITY SERVICE COUNCIL

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Authority: P.L. 248-2001 (SEA 121)

MEETING MINUTES¹

Meeting Date: September 4, 2001
Meeting Time: 1:00 P.M.
Meeting Place: Governmental Center South, 402 W.
Washington St., Conference Rooms
4 and 5
Meeting City: Indianapolis, Indiana
Meeting Number: 2

Members Present: Sen. Beverly Gard, Chairperson; Sen. Glenn Howard; Sen. Vi Simpson; Rep. Richard Mangus; Rep. David Wolkins; Gary Reding; Randy Edgemon; Mayor William Goffinet; Art Smith, Jr.; Ellen Tobias; William Hayden; Kerry Manders; Lori F. Kaplan; Sandra Miles.

Members Absent: Sen. Kent Adams; Rep. Ron Herrell; Rep. Jonathan Weinzapfel; Mayor James Trobaugh.

Sen. Gard opened the meeting at 1:00 p.m. The minutes from the EQSC meeting of August 7, 2001, were approved. Sen. Gard welcomed Sandra Miles, the most recent

¹ Exhibits and other materials referenced in these minutes can be inspected and copied in the Legislative Information Center in Room 230 of the State House in Indianapolis, Indiana. Requests for copies may be mailed to the Legislative Information Center, Legislative Services Agency, 200 West Washington Street, Indianapolis, IN 46204-2789. A fee of \$0.15 per page and mailing costs will be charged for copies. These minutes are also available on the Internet at the General Assembly homepage. The URL address of the General Assembly homepage is <http://www.ai.org/legislative/>. No fee is charged for viewing, downloading, or printing minutes from the Internet.

appointee to the EQSC.

Commissioner Kaplan gave the commissioner's report, which included the following:

1. Outreach, education, and assistance from July 1 through July 31, 2001 (Exhibit 1)
2. Rulemaking updates for the environmental rulemaking boards (Exhibit 2)
3. Fees collected (Exhibit 3)
4. Permit report cards (Exhibit 4)
5. Permit charts (Exhibit 5)
6. Sample news releases from July 31 through August 27, 2001 (Exhibit 6)
7. Handouts on wetlands regulation (Exhibit 7)

In response to a comment from Art Smith, Jr., Commissioner Kaplan indicated that IDEM will consider adjusting the manner in which administratively extended NPDES permits are addressed in IDEM's Permits Report Card. Commissioner Kaplan also responded to questions from Bill Hayden concerning the manner in which major permits are addressed in the Permits Report Card, and the length of extensions.

Sen. Gard began the discussion on wetlands issues. She noted that new issues have arisen since the review by Sen. Simpson's EQSC subcommittee on wetlands last year, many relating to the decision of the U.S. Supreme Court in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC").

Tim Method, Deputy Commissioner, IDEM, described the rulemaking process on wetlands by the Water Pollution Control Board ("WPCB"). Mr. Method noted that wetlands rulemaking began in 1998, and described how the process has proceeded. He stated that several changes have been made to the proposed rule in response to concerns of the EQSC. Mr. Method noted IDEM's position on the effect of SWANCC, as stated in a memorandum to interested persons from the commissioner dated April 11, 2001 (part of Exhibit 7). Waters no longer subject to federal jurisdiction under SWANCC are still considered by IDEM to be waters of the state subject to Indiana water quality standards, and IDEM has created a wetland NPDES program to regulate such waters. The program will regulate discharges of dredged or fill materials to waters of the state, but will not apply to activities regulated under Sections 404 and 401 of the Clean Water Act. IDEM has proposed that this NPDES program will be replaced by a surface water modification permit program. The commissioner's wetland workgroup, comprised of seventeen representatives of groups interested in or affected by IDEM's wetland regulatory program and policies, is assisting in the development of rule language to create the new program. The new program is modeled after other states' programs that combine water quality certification under Section 401 of the Clean Water Act with state wetlands programs. The new program will mirror the Section 401 program. These amendments to the proposed rule will be published, and public comments will be received. The amended proposed rule will be presented to the WPCB this winter for final adoption next spring.

In response to a question from Rep. Wolkins, Mr. Method read the statutory definition of "waters" of the state (IC 13-11-2-265), and provided some examples of private ponds (e.g., stormwater retention ponds at apartment complexes and ponds dug in backyards). In response to a question from Kerry Manders concerning the determination whether there is an exception for private ponds that present danger of pollution, Mr. Method responded that IDEM makes that determination. In response to a question from Mr. Smith concerning legislative authority for administrative rules to address regulation of waters no longer subject to federal jurisdiction under SWANCC, Mr. Method responded that although other

states did legislate in order to act quickly, IDEM believes that the necessary authority for rules exists in current statutes and rules.

James Robb, IDEM, addressed SWANCC. He indicated that the decision does not clearly define certain terms, and that certain assumptions are therefore necessary to estimate the number of waters no longer under federal jurisdiction as a result of SWANCC. He concluded that isolated waters are unevenly distributed in the state, that the effects of SWANCC will depend largely on federal interpretation and states' reactions, and that significant numbers (85%) and area (31%) of Indiana's waters could be removed from federal jurisdiction by SWANCC.

Larry Kane, Bingham Summers Welsh & Spilman, spoke on behalf of the Coalition on Wetlands Issues ("Coalition"). His presentation slides are included as Exhibit 8. Mr. Kane described the Coalition's membership and philosophy, and outlined the wetlands rulemaking process. The Coalition, created in opposition to the draft wetlands rule, has drafted and presented to the WPCB a proposed alternative rule. The Coalition contends that the draft proposed rule duplicates the federal program and goes beyond the federal program with limited environmental benefit. The Coalition proposes that a comprehensive state policy concerning wetland resources and regulation of those resources should be developed, and that IDEM should be directed to develop rules that match that policy. Mr. Kane provided to the EQSC the Coalition's alternative draft rule (Exhibit 9) and a document that compares the IDEM draft rule and the alternative (Exhibit 10).

In response to a question from Sen. Gard, Mr. Kane indicated that he could not express an opinion whether current law is adequate to authorize current proposed regulatory action. In response to a question from Ms. Miles, Mr. Kane indicated that the Coalition is divided on the question whether the state should protect isolated wetlands. In response to a question from Randy Edgemon, Mr. Kane indicated that the Association of Indiana Counties and the Indiana Association of Cities and Towns, both Coalition support groups, agree with the philosophy, goals, and concerns of the Coalition, but provide no monetary support. Mr. Kane responded to concerns of Rep. Mangus concerning jurisdiction over certain wetlands, enforcement of wetlands regulations, and wetlands mitigation. Mr. Kane also addressed questions concerning overlap of regulations concerning wetlands and the nature of the redundancy between the IDEM draft rule and the alternative draft rule. Sen. Gard indicated her belief that the General Assembly should clarify the authority of IDEM to set policy in the wetlands area.

Mark Thornburg, Indiana Farm Bureau ("Bureau"), questioned IDEM's authority to issue NPDES permits regulating the discharge of fill materials into waters of the state, and to regulate all areas where water accumulates during only a part of the year. The Bureau believes that regulation should apply only if there is a threat of pollution of actual waters of the state. Many farmers' wetlands are already under regulation by the Natural Resources Conservation Service ("NRCS"), but there have been conflicting interpretations between NRCS and IDEM. Other states have enacted legislation concerning the isolated wetlands issue, and Indiana should evaluate those efforts. The Bureau would like to see deference to NRCS regulation of wetlands, a reexamination of the meaning of "waters" under Indiana statute, and a codification of wetlands mitigation. The Bureau does not want regulation to hamper normal farming activities.

Lynn Dennis and Dr. John Shuey presented on behalf of the Nature Conservancy, which wants regulation to protect isolated wetlands, thereby furthering the Nature Conservancy's goal of protecting biodiversity. Current protection of wetlands decreases the likelihood that species in wetlands will become endangered and that more wetlands will then fall within the jurisdiction of the U.S. Fish and Wildlife Service. In response to a question from Rep.

Mangus, Dr. Shuey indicated that the Nature Conservancy would support mitigation of wetlands in some cases, and is interested in protecting current wetlands rather than restoring the historical loss of wetlands. Dr. Shuey indicated that he could not address questions concerning the percentage of wetlands that are of high ecological importance, the extent to which Tier I and Tier II wetlands have been identified, and the effect of SWANCC on wetlands.

Dorreen Carey, Environmental Affairs Coordinator, City of Gary, presented the city's concerns that proposed regulations will impede development in the city, particularly development of the Gary Chicago Airport. The city's comments are summarized in a letter from Mayor King to Sen. Simpson (Exhibit 11). Under the proposed regulations, all Dune and Swale remnants in Gary would be classified as Tier II wetlands subject to mitigation. The city has urged that Tier II classification should apply only to the highest quality wetlands that have not suffered extensive degradation and/or environmental contamination. The regulation as proposed would prevent strategic planning and implementation of the airport expansion program. The city proposes that wetland preservation, management, and mitigation should be addressed through a local or regional comprehensive plan.

Bill Baranek, Indiana Environmental Institute, presented concerning the deliberations of a working group seeking to develop recommendations on a comprehensive wetlands policy for the state that would take into account overlap of wetland regulation among governmental bodies, the differences in value among wetlands, the need to generate a net gain in valuable wetlands, the need to create incentives to create wetlands, and the need to not only save current wetlands, but to create wetlands in certain areas. One proposal is the establishment of an upfront restoration wetlands bank that would allow the creation of a wetland without oversight where no wetland now exists. An overall goal is to establish a policy that would be acceptable to all entities now involved in wetlands regulation. In response to a question from Mr. Smith, Mr. Baranek indicated that the working group will meet monthly, will include government representatives, and will try to generate conclusions by the end of the year. Sen. Gard suggested that the working group should consider a wetlands conservation plan developed in 1994, that other states' policies should be reviewed, that an analysis should be done of gaps among governmental entities in the various aspects of wetlands regulation, and that the working group should report its conclusions to the EQSC.

Sen. Gard opened discussion on the Water Data Task Force ("WDTF"). Mr. Baranek stated that a working group of stakeholders has been assembled to focus the questions for WDTF deliberation. Art Umble provided a summary of the working group's activities. Mr. Umble distributed charts (Exhibit 12) summarizing what the working group is trying to accomplish. When the Clean Water Act took effect in the early 1970's, the intent was to look at overall ambient water quality standards. However, the focus soon turned to effluent quality standards and related data. More recently, attention has reverted to ambient standards. There has been uncertainty concerning what data means, how it is collected, and how it is analyzed, used, and developed. Greater consideration of data related to ambient standards is needed to evaluate the appropriate designated use for a water body. The WDTF must draw a distinction between data and the criteria drawn from data. It must be determined what data is to be collected, how the data is to be managed, and how the data is to be analyzed. The WDTF must recognize that there is always an inherent degree of uncertainty in data, and consider how much uncertainty is acceptable. The level of uncertainty can be reduced by the restructuring of resources for data collection, and the reduced uncertainty results in data more reliably used in decision making. In response to a question from Mr. Hayden, Mr. Umble stated his view that probabilistic sampling can be appropriate in some circumstances.

Mr. Beranek addressed the precision of data needed to make certain decisions about water quality. It would be useful for the WDTF to divide the issue into consideration of which data is needed for surface water quality decisions made as part of regulation (e.g., NPDES permit), and which data is needed for more strategic purposes (e.g., nutrient management). The WDTF should not specify what is needed, but should give options with respect to increased resources or reprioritization of resources. Mr. Beranek distributed to the EQSC the minutes of the working group's meeting of August 15, 2001 (Exhibit 13). In response to a question from Sen. Howard, Mr. Beranek discussed the distinctions among circumstances where data is needed for decision making, and those where data is not needed.

Glenn Pratt strongly supported the need for and the work of the WDTF. He likened this effort to that previously carried out under the guidance of then Lt. Gov. O'Bannon concerning water program needs. He noted that industry and municipalities agreed to pay higher permit fees to obtain needed state staffing to implement a rational water program. While the fees were increased, most of the staff has not been brought on board. He emphasized how the program has changed and the resulting need to gather and interpret new data.

Sen. Gard noted that the next EQSC meeting is scheduled at 10:00 a.m. on Friday, September 28, 2001, in the Senate Chambers in the State House. An agenda will be issued. Tentative agenda items are the environmental crimes issue to be addressed by Sen. Kenley, and a review of legislation that did not pass in the last legislative session concerning septic system issues. The focus with respect to septic system issues will be on changes to the legislation to improve the prospects for passage in the next session.

Sen. Gard adjourned the meeting at 4:00 p.m.